IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25/11/2003

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice N. KANNADASAN

W.A. No.230 OF 1999 and W.A. No. 2 OF 2003

Mahalakshmi ..... Appellant in WA 230/99 &
1st respondent in WA 2/03

-Vs-

1. The Chairman & Managing Director
Metro Water Supply & Sewerage Board 1st respondent/
Chennai 600 002 ..... Appellant

2. The Commissioner
Corporation of Chennai
Chennai 600 003 ..... 2nd respondent

Appeals under Cl.15 of the Letters Patent against the order
dated 3-12-1998 in W.P. No.17505 of 1997

!For Appellant :: Mr. T.K. Kulasekaran

^For Respondents :: Mr. K.N. Pandian (R1)
Mrs. P. Bhagyalakshmi (R2)

:JUDGMENT

V.S. SIRPURKAR, J.

This judgment will dispose of the above mentioned two appeals, they being W.A. Nos.230 of 1999 and 2 of 2003. In the first-mentioned case one Mahalakshmi is the appellant while the second is filed by the Chairman and Managing Director, Metro Water Supply and Sewerage Board, Chennai 600 002. Both the appeals are against the judgment of the learned single Judge, who allowed the writ petition filed by Mahalakshmi and directed the payment of

Rs.80,000/- with interest at the rate of 12% per annum with effect from 1997 till date of payment. In this, the learned single Judge ratified the Award of the Arbitrator who was appointed during the pendency of the writ petition to go into the questions regarding the liability, if any, on the part of the Metro Water Supply and Sewerage Board (in short "the Board") to pay the compensation for the loss of the life of the son of the petitioner. Following peculiar facts will highlight the grievance and help to understand the controversy involved.

2. On 19-3-1997 one Pandian, accompanied by his friends, went to Gandhinagar to his grandparents' house. Instead of going by the straight route, they took an unusual route where, they were required to cross a giant water-pipeline, which is erected and supposed to be maintained by the Board. They reached a spot, which was half a kilometer from the southern side of the ICF West Colony and at that time, the said Pandian and his friend Ramesh fell into said water-pipeline and were probably carried by the water gushing through the said pipeline and drowned. The petitioner, therefore, pleaded that the said waterpipeline broke as it was improperly maintained by the Board. A report was made to the police, who came on the spot along with the fireservice personnel and retrieved the bodies and also registered a case at K-7 ICF Police Station under Sec.174 of Criminal Procedure Code vide Crime No.347 of 1997. The petitioner pleaded that apart from maintaining the said water-pipeline, there was no notice cautioning the general public and prohibiting them from scaling over the said giant water-pipeline. It was also pleaded that while crossing the said pipeline, the cement-slab cracked and broke and that is how that the said Pandian fell into the water since the cement-slab caved in. It was then claimed that the said Pandian was sixteen years' old and had studied up to VII standard and was a bright student and he also used to work as a painter and used to earn Rs.3000 per month. Adequate compensation, therefore, was sought.

3. Learned single Judge, by his order, appointed an arbitrator as both the learned counsel agreed for the arbitration. A retired District Judge, Shri Meenakshisundaram, was appointed as Arbitrator to go into the claim. The Arbitrator filed the award dated 2-11-1998. In the Award, the Arbitrator found that the boy was aged eighteen years' old and his monthly income was Rs.1,000/- and, therefore, the petitioner was entitled for a sum of Rs.1,51,200/- on that count. He also found that the petitioner had suffered a conventional loss of Rs.10,00 0/- and as such the total rounded off figure came to Rs.1,60,000/-. However, since the deceased died due to contributory negligence, the petitioner-mother would be entitled only to Rs.80,000/-, which was fifty percent of the entitlement.

3.1. The award was objected to by both the Board as also by the petitioner-mother. As per the petitioner, the award should have been for Rs.3,15,000/- and since the deceased was a minor, no question of any contributory negligence while, the case of the Board was that the concerned person had no business to scale over the water-pipeline and that was not a public road and therefore, the deceased was a trespasser. It was tried to be urged that the water-pipeline was being properly maintained. It was also urged that there was no evidence that there was any negligence shown on the other hand. It was the deceased who was to be blamed.

3.2. Learned single Judge accepted the award and ratified the same upholding the finding of facts arrived regarding the age and also the quantum of compensation to which the petitioner was found to be entitled. It is this order of the learned single Judge, which has been appealed against by both the sides.
4. While in the first-mentioned appeal, the appellant seeks more compensation being dissatisfied with the quantum, in the secondmentioned appeal, the Board claimed that the writ petition was liable to be dismissed as being untenable. We shall take up the secondmentioned appeal first.

5. Shri K.N. Pandian, learned counsel for the Board urged that the learned single Judge erred in entertaining the writ petition at all. According to him, there were questions of facts involved they being firstly, whether the Board was at all responsible and liable to pay the compensation on account of its' being negligent. He pointed out that finding on that question would require supporting evidence and appreciation thereof. Learned counsel further say that there could be a finding of negligence on the part of the Board still, there was a question of contributory negligence on the part of the deceased and for fixing that liability even the finding on his age was a necessary finding. Lastly, learned counsel pointed out that even if ultimately the Board was found liable still the question of quantum had to be decided only on the basis of the evidence and the finding on that question would essentially be in the nature of finding of fact. Learned counsel then pointed out that the learned single Judge firstly erred in entertaining the writ petition when the civil suit was the only remedy. Lastly, the learned counsel urged that the action on the part of the learned single Judge of appointing the Arbitrator was also wholly incorrect and without jurisdiction.

6. On the other hand, learned counsel appearing for the writpetitioner, mother of the deceased, pointed out that there was no question of any evidence being laid as the negligence on the part of the Board in maintenance of the water pipeline was apparent on the face of it. Learned counsel pointed out that a young life was nipped in the bud, leaving the mother in lurch. Learned counsel further urged that, in fact, the arbitrator also had erred in arriving at the quantum as there could be no question of any contributory negligence on the part of the deceased, who was a minor. Learned counsel then urged that the deceased being the only breadwinner of the family, consideration should have been shown while fixing the quantum of compensation.

7. It is, therefore, to be seen as to:
(1) Whether the writ petition was tenable or, under the circumstances, the civil suit was the only remedy?

(2) Whether the Board was liable to pay the damages on account of its' negligence, if any, and to what extent was its' liability and in that whether the deceased was guilty of contributory negligence?
(3) Whether the appointment of an arbitrator was justified in law and whether the arbitrator was right in arriving at the quantum as he did?
(4) What relief could be given to the respondent-mother?

8. In support of his argument, the learned counsel appearing

on behalf of the Board drew our attention to the Supreme Court judgment in reported TAMIL NADU ELECTRICITY BOARD v. SUMATHI AND OTHERS (2000 -4- SCC 543). Learned counsel pointed out that this was a case where the Supreme Court specifically held that the High Court had the jurisdiction under Art.226 to award compensation only where there was a negligence on the part of the State or its' instrumentality and there was an infringement of the right of life guaranteed under Art.21 of the Constitution. According to the learned counsel, the Supreme Court has further held that since there were disputed questions of fact on account of a clear denial of a tortuous liability, the High Court should not have entertained a petition under Art.226. Learned counsel also pointed out that in the same case, there was no scope for the High Court to appoint any arbitrator more particularly in the wake of there being no provisions in the Arbitration and Conciliation Act, 1996 for referring a matter to an arbitrator by the intervention of the Court. Learned counsel further submitted that the High Court could not have straight away passed an order in the nature of a decree in complete contravention of the provisions in the Arbitration Act. The Supreme Court, in this case, was considering a batch of eight appeals. The Supreme Court framed two basic questions, viz.:

1. Can the High Court under Article 226 of the Constitution award compensation for death caused due to electrocution on account of improper maintenance of electric wires or equipment by the Tamil Nadu Electricity Board, the appellant; and
2. whether the High Court while exercising jurisdiction under Article 226 of the Constitution can appoint an arbitrator under the Arbitration and Conciliation Act,1996 (new Act) to decide the quantum of compensation and then make the award of the arbitrator rule of the court.

9. In the said appeals, the Tamil Nadu Electricity Board was a common party and was facing the writ petitions filed by the persons who had been electrocuted because of the snapping of the live wires of the Electricity Board. In all the matters though the disputed questions of fact had arisen, the High Court had entertained the writ petitions and had appointed arbitrators by consent of both the parties and ultimately accepted the awards of the arbitrators and made it a rule of the Court. The Supreme Court first relied on its own decision in CHAIRMAN, GRID CORPORATION OF ORISSA LTD. (1999 -7- SCC 298) where it was held that it was not a fit case for exercising powers under Art.2 26 of the Constitution and that the High Court had gone wrong in proceeding on the basis that the death had taken place because of the electrocution as a result of the deceased coming into contact with the snapped live wire. The Supreme Court had held that the writ petition in reality amounted to an action in tort and wherein the negligence was required to be established and, therefore, since there were disputed questions of fact, the petitioner under Art.226 of the Constitution was not a proper remedy.

10. In that case, the Supreme Court also referred to the earlier decision, viz. SHAKUNTALA DEVI v. DELHI ELECTRIC SUPPLY UNDERTAKING (1 995 -2- SCC 369). However, it was noted that the decision in Shakuntala Devi, cited supra, was exercise of powers under Art.142 of the Constitution by the Supreme Court in a petition filed under Art.32 of the Constitution before

the Supreme Court. Ultimately, after referring to various other decisions, including the decision in NILABATI BEHERA v. STATE OF ORISSA (1993 -2- SCC 746), the Supreme Court, in paragraph 10, held that since there were disputed questions of fact and there was a clear denial of tortious liability, remedy under Art.226 of the Constitution might not be proper. The Supreme Court did ultimately, however, said that it was not as if in every case of tortious liability, civil suit was the only remedy. The Supreme Court clarified when there was negligence on the face of it and an infringement of right under Art.21 of the Constitution, it could not be said that there would be any bar to proceed under Art.226 of the Constitution. The Supreme Court, therefore, allowed the appeals filed by the Electricity Board and directed the writ petitions to be dismissed. It also came to the conclusion in paragraph 12 that since the disputed questions of facts were referred to arbitration in violation of the provisions of the new Arbitration Act, there would be no question of holding that award. It recorded a clear finding that the High Court had no powers to refer the matter to the arbitration in the manner it did and that could be done only under the provisions of the new Arbitration Act. It is liable to be seen that in that case also, the recourse to the arbitration was taken by the consent of the parties. Learned counsel, therefore, rightly submits that this decision is a complete answer to the present writ petition.

11. When we see the facts in this case, it is obvious that there are too many disputed questions of fact. In the first place, the Board had denied that it was in any manner negligent in maintaining the water pipeline. It was pointed out that it was a giant water pipeline and the deceased boy had no business to go over the pipeline as there was a regular road available. It was pointed out that the said water pipeline was not meant for being treaded upon. It is also pointed out that it was the usual practice of local residents, who had encroached upon the adjoining land, to break the pipeline and to take water illegally for their daily chores. The Board also pointed out that there was no question of any rights in favour of the encroachers, who had illegally gone there probably to bail water. In our opinion, this decision would be a complete answer.

12. Learned counsel for the respondent-mother tried to get out of this difficult situation by relying upon some cases of the Supreme Court, viz. LATA WADHWA v. STATE OF BIHAR (2001 -6- Supreme 151); M/s. Green Park Theatres Associated (P) Ltd. and ors. v. Association of Victims of Uphaar Tragedy & Ors. (2001 -6- Supreme 167); M.S. Grewal and another v. Deep Chand Sood and Ors. (2002 -1- L.W. 491); and TMT. CHELLAMMAL alias CHELLAM v. STATE OF TAMIL NADU AND OTHERS (2000 -2- TLNJ 364) and according to the learned counsel, the law laid down in Sumathi's case, cited supra, no longer remaine d good law. We will examine these cases.

13. In Latha Wadhwa case, cited supra, it appears from the facts that in a function to celebrate the 150th Birth Anniversary of Sir Jamshedji Tata on 3-3-1989, within the factory premises, a large number of employees, their family members including small children were invited. However, no safety measures were taken and several provisions of the Factories Act and Factories Rules had been grossly violated. Fire broke out in which,

60 persons were charred to death and few others suffered burn injuries. A direct petition came to be filed before the Supreme Court under Art.32 of the Constitution, which was allowed by the Supreme Court after appointing former Chief Justice of India, Shri Justice Y.V. Chandrachud, on its behalf to enquire as to what would be the proper compensation payable to the victims. In this case, the compensation was sought from the State Government as well as the company. Facts in this case are completely different and we do not think that there are any relevant observations in this case regarding the jurisdictional aspect of the High Court under Art.226 as also about the arbitration aspect. Learned counsel tried to say that in that case also the compensation was awarded by the Supreme Court without directing the parties to the civil court. This position has been examined in Sumathi's case, cited supra, and, therefore, we are of the clear opinion that this case is not applicable to the facts of the present case.

14. The second decision was Uphaar Cinema tragedy case, cited supra. There the spectators of the cinema theatre were charred to death on account of the fire having broken out in the cinema. The writ petition by the association of the victims of Uphaar tragedy was held to be maintainable by the High Court though an objection was raised to its tenability. The Supreme Court did not, in reality, consider the question of tenability as, according to it, the observations and the references to the facts in the course of the order were only of preliminary character. The High Court was merely directed to proceed with the matter. Therefore, this is not a case where the similar question fell for consideration. The case is clearly not applicable to the present case.

15. Yet another decision was pressed into service, viz. the decision in Grewal case, cited supra. This was a case where fourteen students of a public school were drowned when they had gone on a picnic though under the guidance of their teachers. In this case, the question of jurisdiction of the High Court under Art.226 did not really fall for consideration in view of the following observations in paragraph 25:
"... thus the Civil court's jurisdiction ought to have been invoked rather than by way of a writ petition under Article 226 of the Constitution. This plea of non-maintainability of the writ petition though advanced at the initial stage of the submissions but subsequently the same was not pressed and as such we need not detain ourselves on that score excepting however recording that the law Courts exist for the society and they have an obligation to meet the social aspirations of citizens since law courts must also respond to the needs of the people. ..."

Firstly, we did not find any parallel on the facts. That was a clear case where the students, who went for a picnic, were under the control of teachers, who were accompanied them and as such there was a " duty" cast on the school administration generally and the accompanying teachers particularly and, therefore, there was no question of dispute regarding negligence. That was again not a case where the High Court had appointed any arbitrator to find out the liability of negligence and the quantum of damages. The reported decision would be, therefore, of no help to the respondent-mother.

16. Last decision is that of the learned single Judge of this Court in Chellammal case, cited supra. That was a case of custodial death. There, the learned single Judge awarded some compensation. This decision also has no parallel because in Sumathi's case, cited supra, it is clearly held that it is not as if the jurisdiction of the High Court under Art.226 of the Constitution is barred but the jurisdiction was liable to be used only where the negligence was apparent and there was no dispute on that account and further where there was a breach of Art.21 of the Constitution. A death in police lock-up would clearly be a breach of right to life under Art.21 of the Constitution. This decision is also of no help to the respondent.

17. It is, therefore, clear that the only applicable decision in the field is that of Sumathi□s case, cited supra. We would be, therefore, left with no other alternative but to dismiss the writ petition. However, we would choose to adopt the same course as was done by the Apex Court in Sumathi□s case, cited supra. It is reported that a sum of Rs.50,000/- has already been paid to the respondent-mother on account of the part-payment of the compensation. We would only direct that there shall be no recovery of that amount. In view of the fact that we are allowing the appeal filed by the Board, the appeal filed by the respondent-mother would stand dismissed. We further declare that it shall still be open to the respondent-mother to pursue her remedies before the proper forums.

18. In the result, W.A. No.2 of 2003 is allowed and W.A. No.230 of 1999 is dismissed. No costs. Connected miscellaneous petitions, WAMP Nos.2524, 18070 of 1999, 633 of 2002 and 3 of 2003 are closed.

Index:Yes
Website:Yes

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To:

1. The Chairman & Managing Director
Metro Water Supply & Sewerage Board
Chennai 600 002

2. The Commissioner
Corporation of Chennai
Chennai 600 003

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